

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1465

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

AMERICAN IMAGE CORPORATION,

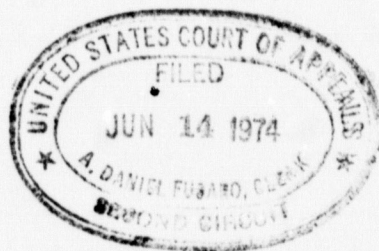
Plaintiff-Appellant,

vs.

UNITED STATES POSTAL SERVICE and JOHN R.
STRACHAN, POSTMASTER, NEW YORK, NEW YORK,

Defendants-Appellees.

JOINT APPENDIX



BASS & ULLMAN
Attorneys for Plaintiff-Appellant
747 Fifth Avenue
New York, New York 10017
(212) 751-9494

PAUL J. CURRAN
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees*
United States Court House
Foley Square
New York, New York 10005
(212) 264-6377

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AMERICAN IMAGE CORP -v- US POSTAL SERVICE et ano.

DOCKET ENTRIES

1a 73 CIV. 356

DATE	PROCEEDINGS	Date Judge
AUG 15-73	Filed complaint and issued summons.	
AUG 29-73	Filed summons and entered marshal's return served on: U.S. Postal service by certified mail receipt #594117 on 8-20-73 & John R. Strachan by Mr. J. Cohen on 8-20-73.	
Sep. 26-73	Filed Pltff's affidavit & notice of motion for summary judgment ret. 10-12-73.	
Sep. 26-73	Filed pltff's memorandum in support of his motion for summary judg.	
Oct. 17-73	Filed affidavit of T.D. Adams in opposition to pltff's motion for, summary judgment.	
Oct. 17-73	Filed deft's memorandum of law.	
Oct. 18-73	Filed pltff's reply memorandum.	
Jan. 15-74	Filed OPINION #40226: This is an action by pltff. to enjoin the, Postal Service from enforcing order 73-86 issued pursuant to 39, U.S.C 3005. The effect of the order is to intercept mail & payments sent to pltff. in connection with a scheme perpetrated by pltff. to obtain money by means or representations deemed by, the Postal service to be false. Both parties move for summary, judgment. Summary judgment granted to deft. & the complaint is, dismissed. So ordered. Knapp, J. Mailed notice.	
Jan. 21-74	Filed Judgment: Ordered that deft's have summary judgment against the pltff. dismissing the complaint. Judg. Ent. Clerk Ent. 1-22-74	
Feb. 15-74	Filed pltff's notice of appeal to the USCA from opinion & order, entered 1-15 74 dismissing complaint. Mailed copy to U.S. Atty.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By [Signature]
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2a

-----X
AMERICAN IMAGE CORPORATION, :
276 Park Avenue South, :
New York, New York, :

Plaintiff, :

-against- :

UNITED STATES POSTAL SERVICE and :
JOHN R. STRACHAN, Postmaster, :
New York, New York, :

Defendants. :

-----X

Plaintiff by its attorneys, Bass & Ullman, as and for
its complaint respectfully alleges:

FIRST: The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1339. Venue is placed in this district pursuant to Title 28 U.S.C. §1391(e)4.

SECOND: Plaintiff in the course of its business, is engaged in distributing and selling direct to the consumer a product known as "Baby Face" Formula as an emollient skin cream. Plaintiff's principal place of business is at 276 Park Avenue South, New York, New York.

THIRD: Plaintiff employs the use of the mark in connection with the sale and distribution of the aforementioned product.

FOURTH: Defendant John R. Strachan, Postmaster, New York, New York, under the color of an order issued on July 19,

1973 by the Judicial Officer for the defendant United States Postal Service, bearing Order No. 73-86, has wrongfully refused and refuses to allow plaintiff to receive mail in connection with its business in the above-mentioned "Baby Face" Formula.

FIFTH: The said order issued by the Judicial Officer purports to be based upon evidence presented by the defendant United States Postal Service by way of a petition for a remedial order based upon an alleged breach of a compromise agreement authorizing the entry of an order pursuant to Title 39 U.S.C. §3005.

SIXTH: The said order of the Judicial Officer is not based upon substantial evidence of any breach of the compromise agreement, no such breach has been shown and no breach has in fact occurred.

SEVENTH: The said order issued by the Judicial Officer is not authorized by Title 39 U.S.C. §3005 pursuant to which it was purportedly issued.

EIGHTH: The interference of the defendants with plaintiff's mail prevents the plaintiff from pursuing its lawful business, from receiving its earnings in a lawful occupation and calling, and constitutes a deprivation of plaintiff's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiff respectfully requests that an order be issued enjoining and restraining defendants from the

Complaint

detention of plaintiff's ~~mail~~ and the enforcement of the afore-^{4a}
said order.

BASS & ULLMAN
Attorneys for Plaintiff

By _____
(A Member of the Firm)

Office & P.O. Address
342 Madison Avenue
New York, New York 10017
(212) 697-3880

AFFIDAVIT OF MARVIN SCHERE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

5a

-----X
AMERICAN IMAGE CORPORATION,
276 Park Avenue South,
New York, New York,

Plaintiff,

-against-

UNITED STATES POSTAL SERVICE and
JOHN R. STRACHAN, Postmaster,
New York, New York,

Defendants.

:
:
73 Civ. 3562 (WK)

:
:
AFFIDAVIT IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT AND INJUNCTIVE
RELIEF

-----X
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MARVIN SCHERE, being duly sworn, deposes and says:

I am the President of American Image Corporation,
plaintiff in the within action. I submit this affidavit in
support of plaintiff's motion herein for summary judgment and
injunctive relief.

On or about April 26, 1972, the defendant United States
Postal Service initiated an administrative proceeding under
§3005 alleging that plaintiff was engaged in a scheme to obtain
remittances of monies through the United States mail upon false
representations and seeking an order which would prevent plain-
tiff from receiving its mail. The representations which were
alleged to be false were contained in an advertisement for
plaintiff's cosmetic product, "Baby Face Formula."

At that time, after reviewing the matter with

Affidavit of Marvin Schere in Support of Motion for Summary Judgment
counsel, plaintiff entered into a compromise agreement, dated 6a
May 31, 1972, with the Postal Service wherein it was agreed that,
in lieu of further proceedings and in lieu of any administrative
order stopping plaintiff's mail, plaintiff would discontinue
use of the representations alleged in the complaint, would fill
all orders promptly, and would include in all orders received in
response to the advertisement being discontinued a statement
that its product would not alter or reverse the natural aging
process and would not remove or eradicate lines or wrinkles due
to aging.

Although plaintiff's counsel and I did not agree with the
allegations made in the administrative complaint, we felt that
in the interest of saving an unnecessary expenditure of time and
money a compromise agreement would be in order in the administra-
tive proceeding. There is annexed hereto as Exhibit "A" the
complaint which had been filed by the defendant United States
Postal Service in the administrative proceeding. Annexed hereto
as Exhibit "B" is the answer which was filed on behalf of plain-
tiff in the administrative proceeding. Said answer denies all of
the material allegations of the complaint. Annexed hereto as
Exhibit "C" is the compromise agreement which was subsequently
entered into between the plaintiff and the United States Postal
Service. I respectfully call the Court's attention to the
provision in Paragraph 4 of the first page of the compromise
agreement wherein it is noted that the agreement is for settle-
ment purpose only and does not constitute any admission of the
alleged violations of the Postal Statute.

In entering into the compromise agreement, it was
clearly my intention that American Image Corporation would be

Affidavit of Marvin Schere in Support of Motion for Summary Judgment
able to continue to sell its "Baby Face" cosmetic product with
new advertising material. In this connection the thrust of the
administrative complaint (Exhibit "A" hereto) was to the effect
that plaintiff's prior advertising material represented that
plaintiff's product "rejuvenated" a woman's face and "eliminated"
wrinkles. After entering into the compromise agreement, plaintiff
revised its advertising material to eliminate the representations
which allegedly related to rejuvenation, the reversal of the
natural aging process and the removal or eradication of lines or
wrinkles due to aging. Nevertheless, on June 19, 1973 the
defendant United States Postal Service filed a petition for a re-
medial order, seeking to stop plaintiff's mail, alleging that
plaintiff's new advertisement constituted a breach of the compro-
mise agreement. A copy of the petition for a remedial order is
annexed hereto as Exhibit "D-1." A copy of plaintiff's answer in
opposition to this petition is annexed hereto as Exhibit "D-2."
On July 19, 1973, the Judicial Officer of the United States Postal
Service entered an order finding that plaintiff had breached the
compromise agreement and directing that mail in response to
plaintiff's new advertisement for the sale of its product called
"Baby Face" be returned to senders with an indication that an
order has been issued for violation of the False Representation
Law. A copy of the Judicial Officer's decision and order is
annexed hereto as Exhibit "E."

There is annexed hereto as Exhibit "F" side-by-side
copies of plaintiff's old advertisement which was annexed to
the administrative complaint and plaintiff's new advertisement
which was annexed to the petition for a remedial order. I

Affidavit of Marvin Schere In Support of Motion for Summary Judgment
respectfully submit that the representations in plaintiff's new
advertisement are clearly different from those which were put in
issue by the administrative complaint which was settled by a
compromise agreement. Whereas the advertisement annexed to the
administrative complaint might be construed to have dealt with
matters of rejuvenation reversing the aging process and causing
lines and wrinkles due to aging to be eradicated and disappear,
I respectfully submit that the representations in plaintiff's
new advertisement are completely different and deal with moistur-
izing dry skin and making skin look younger and smoother. I
respectfully submit that these representations, in plaintiff's
new advertisement, are ordinary everyday cosmetic claims which
are generally made by the industry for cosmetic skin creams. Had
I known that it was the defendants' intention to prohibit plain-
tiff from making such claims, plaintiff would never have entered
into the compromise agreement.

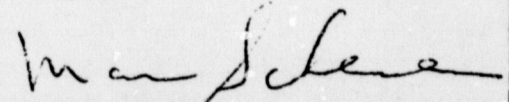
I respectfully submit that plaintiff's new advertisement
does not make the representations referred to in Paragraph 3a.
or 3b. of the administrative complaint. Moreover, with respect
to Paragraph 3c. of the administrative complaint, it was expressly
understood in entering into the compromise agreement that the
administrative allegation that plaintiff had represented its
product to incorporate materially different and distinctive
principles and techniques from all other beauty preparations
related to the allegations in Paragraph 3a. and 3b. of the com-
plaint that plaintiff had represented its product to be effective
for rejuvenation and the elimination of wrinkles. It most

Affidavit of Marvin Schere in Support of Motion for Summary Judgment
certainly was not plaintiff's intention to agree that it could

9a

not represent its product to be a new and exciting formula for moisturizing dry skin and for making skin smoother and younger looking. Annexed hereto as Exhibit "G" is a copy of a letter which my attorneys had forwarded to the United States Postal Service with the aforementioned compromise agreement, setting forth the intention of the parties with respect to the allegations of Paragraph 3c. of the complaint.

I respectfully submit that plaintiff has not violated the compromise agreement heretofore entered in the administrative proceeding. Defendant United States Postal Service has raised entirely new issues with respect to plaintiff's new advertisement. If it is defendants' intention to stop plaintiff from making ordinary cosmetic claims for its product, then I believe defendants should be required to initiate a new proceeding wherein plaintiff can have the opportunity to defend its product and the cosmetic representations made therefor in an administrative hearing prior to the issuance of any order to the detention of its mail. I therefore respectfully request that this Court grant plaintiff's motion for summary judgment and enjoin the defendants herein from enforcing the mail stop order issued by the Judicial Officer of the United States Postal Service on July 19, 1973.



MARVIN SCHERE

Sworn to before me this

26~~th~~ day of September, 1973.

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

10a

HRH:cw
GC 10-71-F

1. 5. 1991.

DATE _____

DATE APR 25 1978

New York, NY 10010

P. S. Docket No. 1/81

a. The female user of "'Baby Face' Formula" will thereby experience a rejuvenation of her physical appearance. (e.g., "I Looked 20 years younger

Exhibit A - Administrative Complaint

11a

...In only 2 short months!!! Yes! This is my unbelievable story of how 'I' a 50 year old woman...transformed herself into a radiant woman who looked years younger! I actually rejuvenated my facial glands and skin tissues so that I now look years younger than I really am." etc.)

b. Use of "'Baby Face' Formula" will prevent and eliminate wrinkles, lines and other signs of skin aging. (e.g., "Yes, it was like a miracle took place--as years of telltale age lines seemed to disappear from my face in just 60 days." Sensational Beauty Preparation Helps End Lines, Wrinkles and Dry Flabby Skin Forever." "2. Age lines, Wrinkles, Flabby Dry skin MUST disappear." etc.)

c. "'Baby Face' Formula" incorporates materially different and distinctive principles, techniques or ingredients from all other beauty preparations. (e.g., "My formula works in a completely new and different way from beauty preparations of the past. If you, like many other women, have spent small fortunes on different beauty preparations without the success you expected...now at last here is your opportunity to try my exciting new formula." etc.)

(4) The aforesaid representations are materially false as a matter of fact.

WHEREFORE, Complainant requests that an Order conforming with 39 U.S.C. §3005(a) (1) and (2) be issued against Respondent and hereby designates H. Richard Hefner as Counsel for Complainant herein.

Louis A. Cox
General Counsel

George C. Davis
BY: George C. Davis
Assistant General Counsel
Consumer Protection Office

Attachment

I Looked 20 Years Younger ...in Only 2 Short Months!!!

YES! THIS IS MY UNBELIEVABLE STORY OF HOW "I" A 50 YEAR OLD WOMAN... TRANSFORMED MYSELF INTO A RADIANT WOMAN WHO LOOKED YEARS YOUNGER! I ACTUALLY REJUVENATED MY FACIAL GLANDS AND SKIN TISSUES SO THAT I NOW LOOK YEARS YOUNGER THAN I REALLY AM.

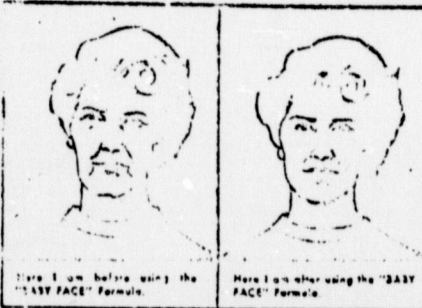
YES, IT WAS LIKE A MIRACLE TOOK PLACE - AS YEARS OF TELLTALE AGE LINES SEEMED TO DISAPPEAR FROM MY FACE IN JUST 60 DAYS. EVEN MY HUSBAND WATCHED THIS CHANGE WITH DISBELIEF. IT WAS ALMOST AS IF I HAD PLASTIC SURGERY, FACIAL LINES, "CROWS FEET" AND MY FLABBY CHIN LINES AND PUFFY CHEEKS SMOOTHED ALMOST BEFORE MY EYES. I DID ALL THIS BY USING MY OWN SIMPLE FORMULA.

My formula "BABY FACE", certainly was responsible for making me appear years younger and it may do the same for you. The "BABY FACE" Formula goes to work immediately to replenish and revitalize your skin by lubricating and moisturizing, to restore that fresh, youthful appearance. And, it's so simple to use that any woman can apply it herself in only a few minutes.

NOW YOU CAN LOOK YEARS YOUNGER

SENSATIONAL BEAUTY PREPARATION HELPS END LINES, WRINKLES AND DRY FLABBY SKIN FOREVER

The entire transformation was so easy quick and pleasant. My formula works in a completely new and different way from beauty preparations of the past. If you like now... Try the "BABY FACE" Formula at my risk for 15 days FREE. If during the 15 day trial period you don't see a dramatic change and difference in your face... If you don't feel you look years younger... return the unused portion for a complete refund. Send for your order now... Supplies are limited.



many other women, have spent small fortunes on different beauty preparations without the success you expected... now at last here is your opportunity to try my exciting new formula.

**I GUARANTEE RESULTS IN 15 DAYS
OR MONEY BACK!**

<p>HERE IS MY GUARANTEE TO MY CUSTOMERS</p> <ol style="list-style-type: none"> 1. You MUST look years younger after using the "BABY FACE" Formula. 2. Age lines, Wrinkles, Flabby Dry skin MUST disappear. 3. You MUST be satisfied with the results after using the "BABY FACE" Formula and see the results you expect in your own mirror or MONEY BACK. 4. The "BABY FACE" Formula MUST give you the fastest results you have ever witnessed from any beauty preparation. 	<p>PLEASE FILL IN THE REQUESTED INFORMATION</p> <p>NAME: _____</p> <p>ADDRESS: _____</p> <p>CITY: _____ STATE: _____ ZIP: _____</p>	<p>AMERICAN BEAUTY PRODUCTS, INC. 1947 275 Park Avenue South, New York, N.Y. 10010</p> <p>Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula. I understand that if I do not lose my entire satisfying appearance after using your "BABY FACE" Formula... I am entitled to a refund of the complete purchase price.</p> <p>Enclosed is: <input type="checkbox"/> Cash <input type="checkbox"/> Check <input type="checkbox"/> Money Order</p> <p><input type="checkbox"/> 1 order of "BABY FACE" only \$4.00</p> <p><input type="checkbox"/> Double Order of "BABY FACE" only \$8.00 (Save \$2.00)</p> <p><input type="checkbox"/> Triple Order of "BABY FACE" only \$12.00 (Save \$3.00)</p> <p>Name: _____</p> <p>Address: _____</p> <p>City: _____ State: _____ Zip: _____</p> <p>SORRY... WE DO NOT SHIP C.O.D. ORDERS</p>
--	--	---

United States Postal Service

COMPLAINANT'S

Exhibit A

EXHIBIT B - ANSWER TO ADMINISTRATIVE COMPLAINT

13a

UNITED STATES POSTAL SERVICE

WASHINGTON, D.C. 20260

In the Matter of the Complaint Against)

AMERICAN IMAGE CORPORATION)
276 Park Avenue South)

at)

New York, NY 10010)

P.S. Docket No. 1/81

ANSWER

Respondent, AMERICAN IMAGE CORPORATION, appearing in this proceeding by its attorneys Bass & Ullman, for its answer to the complaint, respectfully alleges:

1. Respondent denies that it is or has been obtaining remittances of monies through the mails by means of false representation.

2. Respondent admits that it employs the use of the mails in the operation of its business enterprise and that the exhibit attached to the complaint is a true copy of advertising material that was used by respondent in its business enterprise, but denies that such advertising was used as part of any scheme to obtain monies through the mail by false representations.

3. Respondent denies each and every allegation in

Paragraph 3 of the complaint and alleges that the advertising material attached to the complaint speaks for itself with respect to the representations actually made therein.

4. Respondent denies each and every allegation in Paragraph 4 of the complaint.

WHEREFORE, respondent requests that the complaint herein be dismissed.

Dated: New York, New York
May 8, 1972

Respectfully submitted,

AMERICAN IMAGE CORPORATION

By _____
MARVIN SCHERE
President

BASS & ULLMAN
Attorneys for Respondent
Office & P.O. Address
342 Madison Avenue
New York, New York 10017
(212) 697-3880

EXHIBIT C - COMPROMISE AGREEMENT
UNITED STATES OF AMERICA
BEFORE THE POST OFFICE DEPARTMENT
Washington, D.C. 20260

15a

In the Matter of

HRH:ew

American Image Corporation
276 Park Avenue South

at

New York, NY 10010

G.C. No. 10-71-F

Re: Advertisement of "Baby Face
Formula"

COMPROMISE AGREEMENT

For and in consideration of the General Counsel's offer to suspend further administrative proceedings under the postal false representation and lottery statute, Title 39, U.S. Code, ~~§4005~~, as amended, concerning certain promotional activities and representations described in a Complaint dated issued by the Assistant General Counsel, ~~XXXXXX~~ (which is incorporated herein and made a part hereof by reference) the undersigned owner or principal officer of the above-captioned enterprise(s), agrees and consents as follows:

1. The use of the aforementioned promotional activities and representations for obtaining money or property through the mails has been and will be permanently discontinued and abandoned, and will not hereafter be resumed, directly or indirectly, under any name or names, or through any corporate or other device.

2. All remittances, orders, or other mail of any kind hereafter received by the undersigned which relate to the activities discontinued hereby will be promptly returned to senders, and the undersigned will not furnish information to any person advising where, how, or from whom the materials or service in this proceeding may be procured, **except as provided on the "rider" attached hereto.**

3. A breach of this agreement by the undersigned or any party in privity with the undersigned will warrant the issuance of an order pursuant to §4005, *supra*, by the Postmaster General, Deputy Postmaster General, or the Judicial Officer for the Post Office Department, against the name or names appearing in the caption hereof, or any other name or names then in use, provided that the undersigned or his attorney of record is first served with a copy of the petition for such order.

4. This agreement relates exclusively to the matter involved herein and the execution hereof shall not constitute a defense or release of the undersigned of any responsibility for violation of any other statute. This agreement is for settlement purposes only and does not constitute an admission by the undersigned of a violation of §4005, *supra*.

5. No officer, employee, or agent of the Post Office Department has expressly or impliedly, directly or indirectly, accepted or approved any revised advertising matter or activities presently employed or contemplated for future use by the undersigned.

Dated this 31st day of May, 1972.

Witness:

(Signature)

(Name)
Robert Ullman
BASS & ULLMAN
342 Madison Avenue
Street Address

New York, New York 10017

City, State and ZIP Code

Marvin Schere, President

(Please print or type name and title)

276 Park Avenue S.

Street Address

New York, New York 10010

City, State and ZIP Code

* §4005 reenacted under the Postal Reorganization Act, P.L. 91-375 as
Title 39 U.S. Code §3005

POD Form

2157

MAY 1972

** Consumer Protection Office

Exhibit C - Compromise Agreement
RIDER TO COMPROMISE AGREEMENT

16a

The undersigned agrees that in the future orders for the product "Baby Face Formula" which are in response to the advertisement discontinued by paragraph 1 of the attached Compromise Agreement will be treated as follows:

A. All orders will be promptly filled.

B. A statement will be included with each order to the effect that the product will not alter or reverse the natural aging process and will not remove or eradicate lines or wrinkles due to aging. The statement will also clearly set forth that purchasers who have misconstrued the advertisement hereby discontinued will receive a full refund of the purchase price plus postage upon return of the product.

EXHIBIT D-1 - PETITION FOR REMEDIAL ORDER BASED UPON
BREACH OF AGREEMENT

UNITED STATES POSTAL SERVICE

WASHINGTON, D. C. 20260

BH:HRH:ew
GC 30-73-F

17a

In the Matter of the Complaint Against)

American Image Corp.
276 Park Avenue South)

at)

New York, NY 10010)

JUN 19 1982

P. S. Docket 1/81
DOCKETED:

P. S. NO. 1/81
6/19/73

PETITION FOR REMEDIAL ORDER

BASED UPON BREACH OF AGREEMENT

The Consumer Protection Office, Law Department, United States Postal Service (Complainant) has evidence that American Image Corporation (Respondent) is engaged in conducting an enterprise through the mails in violation of the terms of a Compromise Agreement filed with the Docket Clerk for the United States Postal Service. The evidence supporting this contention is as follows:

(1) On April 26, 1972, a Complaint was filed alleging that American Image Corporation was engaged in activities violative of the Postal False Representations Statute, 39 U.S.C. §3005. The Complaint related to alleged false representations used in the advertisement and sale of a product known as "'Baby Face' Formula." Paragraph (3) of the Complaint set forth three specific allegations of false representations contained in Respondent's advertisement and quoted illustrative language from the advertisement in support of each charge. A copy of Respondent's advertisement was attached as Exhibit "A" to the Complaint.

Exhibit D-1 - Petition for Remedial Order Based Upon
Breach of Agreement

2

18a

The matter was terminated on June 2, 1972, by the filing of a Compromise Agreement executed by the Respondent. Among other things the Agreement provided for the summary issuance of an order as authorized under 39 U.S.C. §3005, if the undersigned or his attorney of record is first served with a copy of the petition. Paragraph (1) of the Agreement provided for the permanent discontinuation of the promotional activities and representations.

(2) Attached hereto is a photostatic copy of Respondent's current advertisement. Complainant submits that the current advertisement essentially continues to make the representations which the Respondent agreed to discontinue. Again the product being offered for sale is "'Baby Face' Formula."

Subparagraph (a) of the Complaint charged the Respondent with falsely representing that the product would accomplish a rejuvenation in the physical appearance of the user. This representation is essentially present in the current ad in the form of such language as "I Looked Years Younger ... in only 2 Short Months!!!" "You MUST look years younger..." "... a 50 year old woman ... transformed herself into a radiant woman who looked years younger!" "... I now look years younger than I really am." The foregoing quotations are only illustrative and by no means exhaust the instances of language which would support this contention. The references to looking

younger and a youthful appearance, or the like, are numerous and sprinkled throughout Respondent's advertisement.

Subparagraph (b) of the Complaint charged Respondent with falsely representing that use of the product would prevent and eliminate wrinkles, lines and other signs of skin aging. In addition to the "Before" and "After" pictures, the present advertisement continues this representation by means of such language as "... as years of telltale age lines seemed to fade from view in just 60 days." "Even my husband, watched this change with disbelief." "Facial lines, 'crows feet' and my flabby chin lines and puffy cheeks smoothed almost before my eyes."

Subparagraph (c) of the Complaint charged Respondent with falsely representing that the product incorporates materially different and distinctive principles, techniques or ingredients from all other beauty preparations. The language cited as support for this charge remains present in Respondent's current advertisement. The supposed unique qualities or properties of the "'Baby Face' Formula" must be judged in the context of the results promised with respect to restoration of a youthful appearance and removal of wrinkles. The fact that Respondent continues to employ this representation is inescapable.

CONCLUSION

Respondent's current advertisement continues to employ the representations which it was agreed would be discontinued

Exhibit D-1 - Petition for Remedial Order Based Upon
Breach of Agreement

4

20a


as a basis for disposing of the pending charges. This advertisement constitutes a violation of the Compromise Agreement.

WHEREFORE, Complainant respectfully moves that (1) a copy of this petition be served upon both Respondent and Respondent's attorney of record, Robert Ullman, Esq., Bass and Ullman, 342 Madison Avenue, New York, NY 10017, and (2) an order issue against Respondent consistent with the provisions of 39 U.S.C. §3005.

Respectfully submitted,

Louis A. Cox
General Counsel

BY:


George C. Davis
Assistant General Counsel
Consumer Protection Office

Attachments

EXHIBIT - NEWSPAPER ADVERTISEMENT ANNEXED TO EXHIBIT D-1

I Looked Years Younger ...in Only 2 Short Months!!!



Here I am after using the "BABY FACE" Formula.

Here I am before using the "BABY FACE" Formula.

Yes! This is my unbelievable story of how "I" a 50 year old woman ... transformed herself into a radiant woman who looked years younger! I actually softened and smoothed out my skin tissues so that I now look years younger than I really am. Yes, it was like a miracle took place — as years of telltale age lines seemed to fade from view in just 60 days.

Even my husband watched this change with disbelief. Facial lines, "crows feet" and my flabby chin lines and puffy cheeks smoothed almost before my eyes. I did all this by using my own simple formula.

My formula "BABY FACE", certainly was responsible for making me appear years younger and it may do the same for you. The "BABY FACE" Formula goes to work immediately to replenish and revitalize your skin by lubricating and moisturizing, to restore that fresh, youthful appearance. And it's so simple to use that any woman can apply it herself in only a few minutes.

NOW YOU CAN LOOK YEARS YOUNGER

The entire transformation was so easy, quick and pleasant. My formula imparts a new youth-look, beauty and freshness to aging, dry, wrinkled skin — caused by lack of moisture. It works in a completely new and different way from beauty preparations of the past. If you, like many other women, have spent small fortunes on different beauty preparations without the success you expected ... now at last here is your opportunity to try my exciting new formula. It is a "Fountain of Youth" for thirsty dry skin!

LOOK YOUR YOUTHFUL BEST!

BABY FACE has produced startling results in beautifying, and enchanting the skin's appearance. It replenishes lost moisture and helps to obtain a soft, radiant, almost sparkling lustrous complexion, with youthful and exciting tone.

I GUARANTEE RESULTS IN 15 DAYS OR MONEY BACK!

Try the "BABY FACE" Formula at my risk for 15 days FREE. You must capture that radiant young-again look. If during the 15 days trial period you don't see a truly dramatic change and difference in your face ... if you don't feel you look years younger ... return the unused portion for a complete refund. Send for your order now.

SHIPPED IN PLAIN WRAPPER

AMERICAN IMAGE CORP., 276 Park Avenue South, Dept. M-479-P N.Y., N.Y. 10010
Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula.

☐ 1 Order of "BABY FACE" only \$4.98 ☐ Cash ☐ Check ☐ Money Order
☐ Double Order of "BABY FACE" only \$9.00 (Save \$2.00)
☐ Triple Order of "BABY FACE" only \$12.00 (Save \$3.00)

Name _____
Address _____
City _____ State _____ Zip _____

— SORRY ... WE DO NOT SHIP C.O.D. ORDERS —

HERE IS MY GUARANTEE TO MY CUSTOMERS

1. You MUST look years younger after using the "BABY FACE" formula.
2. You must have a smoother and softer, younger looking complexion.
3. You MUST be satisfied with the results after using the "BABY FACE" FORMULA and see the results you expect in your own mirror or MONEY BACK.
4. The "BABY FACE" Formula MUST give you the fastest results you have ever witnessed from any beauty preparation.

EXHIBIT D-2 - ANSWER TO PETITION

22a

UNITED STATES POSTAL SERVICE

WASHINGTON, D. C. 20260

In the Matter of the Complaint Against)

American Image Corp.)

276 Park Avenue South)

at)

New York, New York 10010)

P.S. Docket No. 1/81

ANSWER TO PETITION

Respondent by its attorneys, Bass & Ullman, respectfully submits the following response in opposition to complainant's petition for a Remedial Order based on an allegation that a current advertisement by respondent constitutes a breach of a Compromise Agreement dated May 31, 1972.

Respondent denies that it has breached the Compromise Agreement dated May 31, 1972.

Before considering the matter of the alleged breach of the Compromise Agreement, respondent wishes to raise as a threshold question a consideration of the actual nature of the issues being raised by complainant's petition. Complainant is now attacking not merely the representations in respondent's current advertisement. Rather, complainant has, in effect, launched an attack against the entire cosmetic industry by alleging that representations pertaining to looking years

younger,^{AND} younger looking and smoother looking skin are false. Representations of improved appearance by the use of cosmetic products have been made since time immemorial. Respondent respectfully submits that if complainant desires to attack industry statements of this kind, then it should do so in a proceeding which takes on such issues directly. In making statements relating to younger looking appearance and smoother looking skin, respondent says no more for its cosmetic skin cream than is said by all other manufacturers of like products. Respondent respectfully submits that it should not be singled out from the entire industry for the type of collateral attack being made by the instant petition. In effect complainant would seek to prohibit respondent from saying for its emollient skin cream what all of respondent's competitors are permitted to say for their skin moisturizers and emollients. Respondent respectfully submits that an alleged breach of a Compromise Agreement is not the appropriate vehicle for this agency to seek a change in the traditional claims for cosmetic creams of younger appearance and younger looking, smoother looking skin. If such an issue is to be raised it should be done in a proper proceeding with the industry as a party and with the opportunity for a hearing and determination of whether one can have a younger looking appearance and younger smoother looking skin with the application of an emollient, lubricating

and moisturizing skin cream.

Considering respondent's current advertisement and the specific allegations of a breach of the Compromise Agreement herein, complainant, at page 2 of the petition states that "Again the product being offered for sale is 'Baby Face' Formula." At the very outset it should be noted that the Compromise Agreement herein contemplated that respondent would be able to continue the sale of its "Baby Face" product. Thus, the Rider to the Compromise Agreement specifically provides that in filling orders received in response to the advertisement, respondent will include a statement that its product is not intended to reverse the natural aging process or eradicate wrinkles due to aging and that anyone who so construed the advertisement then being used by respondent would receive a full refund. Clearly there was no intention that respondent would terminate the sale of its "Baby Face" product. Rather, it was the obvious contemplation of the parties that future sales of the product would not be accompanied by or tied into the representations spelled out in the Rider.

Respondent respectfully submits that the advertisement amended to the instant petition does not continue to make the representations which respondent agreed to discontinue by the terms of the Compromise Agreement. The fact is that respondent has specifically eliminated the language which complainant indicated in its complaint constituted objectionable representations:

1. Respondent has eliminated the headline reference to "20 years younger". Without admitting the allegations of the complaint, respondent removed the "20 Year" reference to avoid any issue with respect to an alleged representation of rejuvenation. Respondent respectfully submits, however, that it is a far different thing to say that the use of a cosmetic skin cream will give the user younger looking skin. A representation of "look years younger" for an emolient cream - a moisturizing and lubricating agent - certainly does not carry with it a connotation of "rejuvenation" particularly in the perspective of all cosmetic skin cream advertisements wherein such ordinary claims are made.

2. Respondent specifically eliminated the reference to "rejuvenated my facial glands and skin."

3. Respondent eliminated the reference to plastic surgery and the statement that lines "seemed to disappear from my face." Respondent submits that its references to smoother skin and that "lines seemed to fade from view" are not equivalent representations at all. See Postal Service Decision in Naturalon Ltd., P.S. Docket No. 1/172 at page 4.

4. Respondent eliminated the statement that its preparation "helps end lines, wrinkles and dry flabby skin forever."

5. Respondent eliminated the statement in its guarantee that "age lines, wrinkles, flabby dry skin **MUST** disappear."

Clearly then, respondent has eliminated all repre-

representations which relate to rejuvenation, i.e. that its product will reverse the natural aging process, and the removal or eradication of lines and wrinkles due to aging. The emphasis of respondent's current advertising is on the lubricating and moisturizing effects of its product and the resultant effect of giving the user smoother looking and younger looking skin.

The representations to which complainant now makes reference in its petition are not the representations to which it referred in the original complaint. It is no answer for complainant to say that the representations set forth in its complaint are not all inclusive merely because they are preceded by an "e.g." Surely complainant would not suggest that its "e.g.'s" are merely a device for inducing a Compromise Agreement after which it will seek to embrace other representations in an attempt to stop respondent's mail in later years without the necessity of a hearing. It is also no answer for complainant to say that a respondent must guess at its peril whether it is in compliance with a Compromise Agreement because, contrary to the procedures of other agencies such as the FTC, complainant will not review, on an advisory basis, the matter of compliance. A Compromise Agreement should not become a matter of guesswork - a vehicle for a guessing game wherein if a respondent guesses

wrong as to whether certain previously unspecified representations are deemed within those specifically objected to he gets caught in the hunter's trap.

The representations of which complainant now complains are completely different from those of which it originally complained in its complaint. We are now confronted with two entirely different categories of representations. The advertisement annexed to the complaint dealt with matters of rejuvenation, reversing the aging process, and causing lines and wrinkles due to aging to be eradicated or disappear. The advertisement annexed to the petition talks of moisturizing dry skin and making skin look younger and smoother, giving a younger looking appearance. Any question as to whether the parties intended to prohibit both types of representations is clearly resolved by Paragraph B of the Rider to the Compromise Agreement which states:

"A statement will be included with each order to the effect that the product will not alter or reverse the natural aging process and will not remove or eradicate lines or wrinkles due to aging. The statement will also clearly set forth that purchasers who have misconstrued the advertisement hereby discontinued will receive a full refund of the purchase price plus postage upon return of the product."

The Compromise Agreement herein was entered into after negotiation and discussion between the parties as to

what type of representations were objectionable and to be changed. The rider makes it perfectly clear that the representations which the parties contemplated would no longer be made are those of the first category, i.e. representations to the effect that "the product will not alter or reverse the natural aging process and will not remove or eradicate lines or wrinkles due to aging." Respondent would never have entered into a Compromise Agreement if it had been complainant's intention that respondent could not make ordinary cosmetic claims for its skin cream promoting younger, smoother looking skin. It was clearly not the intent of the parties to deny or deprive respondent of its right to an evidentiary hearing with respect to such representations. As to these representations, respondent did not waive the normal requirement that complainant be put to its proof in the usual course of an Administrative Hearing and proceeding. As to these representations, this is not a case where respondent waived a hearing and consented to any summary disposition of the issues. See Mark Eden v. Lee 433 F2d 1077 (9th Cir. 1970) at page 1087.

For the foregoing reasons respondent respectfully submits that there has been no violation of the Compromise Agreement, and that Complainant's petition^{542. D} be denied and dismissed. If the Judicial Officer determines that oral argu-

ment is necessary or appropriate herein, respondent requests the opportunity to present such oral argument.

Respectfully submitted,

BASS & ULLMAN
Attorneys for Respondent

EXHIBIT E - ORDER ON BREACH OF COMPROMISE AGREEMENT

30a



JUDICIAL OFFICER
Washington, DC 20260

In the Matter of the Complaint)	July 19, 1973
against)	
)	
AMERICAN IMAGE CORP.)	
276 Park Avenue South)	
)	P.S. Docket No. 1/81
at)	
)	
New York, New York 10010)	

ORDER ON BREACH OF COMPROMISE AGREEMENT

On April 26, 1972, the General Counsel filed a complaint in the above-captioned matter charging Respondent with obtaining money or property through the mails by means of the following false representations:

a. The female user of "'Baby Face' Formula" will thereby experience a rejuvenation of her physical appearance. (e.g., "I Looked 20 years younger ... In only 2 short months!!! Yes! This is my unbelievable story of how 'I' a 50 year old woman... transformed herself into a radiant woman who looked years younger! I actually rejuvenated my facial glands and skin tissues so that I now look years younger than I really am." etc.)

b. Use of "'Baby Face' Formula" will prevent and eliminate wrinkles, lines and other signs of skin aging. (e.g., "Yes, it was like a miracle took place--as years of telltale age lines seemed to disappear from my face in just 60 days." Sensational Beauty Preparation Helps End Lines, Wrinkles and Dry Flabby Skin Forever." "2. Age lines, Wrinkles, Flabby Dry skin MUST disappear." etc.)

c. "'Baby Face' Formula" incorporates materially different and distinctive principles, techniques or ingredients from all other beauty preparations. (e.g., "My formula works in a completely new and different way from beauty preparations of the past. If you, like many other women, have spent small fortunes on different beauty preparations without the success you expected ...now at last here is your opportunity to try my exciting new formula." etc.)

Following the filing of an answer, Respondent executed a Compromise Agreement whereupon on motion of Complainant, further proceedings were indefinitely suspended. As is ordinarily provided the Compromise Agreement contains the undertaking of Respondent to discontinue the promotional activities described in the complaint and authorized the issuance of a remedial order under 39 U.S.C. 3005 upon a breach of the agreement after notice to Respondent.

On June 19, 1973, Complainant filed a Petition for Remedial Order Based Upon Breach of Agreement in which it was alleged that Respondent is continuing the promotional activities and representations described in the original complaint. A copy of the current advertising used by Respondent is attached to the petition. Following the filing of the petition, Respondent's Counsel upon his oral request was informally granted an opportunity to reply to the petition not later than June 29, 1973. The Respondent's reply was not received by the Docket Clerk until July 2, 1973, although it was mailed with a transmittal letter dated June 28, 1973, from New York City. Counsel should have

been aware that the Judicial Officer had intended that any response would reach him by June 29, 1973, since the latter was not scheduled to be in his office during the period July 2 through July 5, 1973. A more careful adherence by Counsel to the terms and spirit of oral time authorizations can facilitate granting of requests that may be hereafter informally made. Nevertheless the answer to the petition has been fully considered.

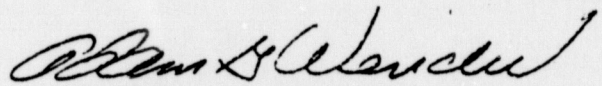
The language cited in Charge c set out above is used verbatim in the advertisement attached to the petition. Respondent, of course, concedes that the advertisement is one used by him. Since the use of the language quoted was not discontinued as the Compromise Agreement required a remedial order is justified by that fact alone. The Compromise Agreement has been so clearly violated in this respect that no useful purpose would be served by ordering a hearing in this matter.

Although some modification of the language of the advertisement has occurred with respect to the matters charged in a and b, the thrust of the advertisement with respect to these matters continues. I must conclude, therefore, that Respondent has violated the agreement with respect to Charges a and b.

A copy of the advertisement attached to the complaint of April 26, 1972, is attached as Appendix A and a copy of the

advertisement attached to the petition of June 19, 1973, is attached as Appendix B.

In view of the foregoing the motion for a hearing is denied and a remedial order under 39 U.S.C. 3005 is being issued herewith.



Adam G. Wenchel
Judicial Officer

I Looked 20 Years Younger ...in Only 2 Short Months!!!

YES! THIS IS MY UNBELIEVABLE STORY OF HOW "I" A 50 YEAR OLD WOMAN... TRANSFORMED HERSELF INTO A RADIANT WOMAN WHO LOOKED YEARS YOUNGER! I ACTUALLY REJUVENATED MY FACIAL GLANDS AND SKIN TISSUES SO THAT I NOW LOOK YEARS YOUNGER THAN I REALLY AM.

YES, IT WAS LIKE A MIRACLE TOOK PLACE - AS YEARS OF TELLTALE AGE LINES SEEMED TO DISAPPEAR FROM MY FACE IN JUST 60 DAYS. EVEN MY HUSBAND WATCHED THIS CHANGE WITH DISBELIEF. IT WAS ALMOST AS IF I HAD PLASTIC SURGERY, FACIAL LINES, "CROWS FEET" AND MY FLABBY CHIN LINES AND PUFFY CHEEKS SMOOTHED ALMOST BEFORE MY EYES. I DID ALL THIS BY USING MY OWN SIMPLE FORMULA.

My formula "BABY FACE", certainly was responsible for making me appear years younger and it may do the same for you. The "BABY FACE" Formula goes to work immediately to replenish and revitalize your skin by lubricating and moisturizing, to restore that fresh, youthful appearance. And, it's so simple to use that any woman can apply it herself in only a few minutes.

NOW YOU CAN LOOK YEARS YOUNGER

SENSATIONAL BEAUTY PREPARATION HELPS END LINES, WRINKLES AND DRY FLABBY SKIN FOREVER

The entire transformation was so easy quick and pleasant. My formula works in a completely new and different way from beauty preparations of the past. If you, like



many other women, have spent small fortunes on different beauty preparations without the success you expected... now at last here is your opportunity to try my exciting new formula.

I GUARANTEE RESULTS IN 15 DAYS OR MONEY BACK!

Try the "BABY FACE" Formula at my risk for 15 days FREE. If during the 15 day trial period you don't see a dramatic change and difference in your face... If you don't feel you look years younger... return the unused portion for a complete refund. Send for your order now... Supplies are limited.

HERE IS MY GUARANTEE TO MY CUSTOMERS

1. You MUST look years younger after using the "BABY FACE" Formula.
2. Age lines, Wrinkles, Flabby Dry skin MUST disappear.
3. You MUST be satisfied with the results after using the "BABY FACE" Formula or see the results you expect in your own mirror or MONEY BACK.
4. The "BABY FACE" Formula MUST give you the fastest results you have ever witnessed from any beauty preparation.

PLEASE FILL IN THE
ENCLOSED INFORMATION
PLEASE DO TO YOUR
FRIENDS

I would like to
look years
younger.

My skin on my
face and neck is flabby

My skin is too
dry and flaky.

I have wrinkles
and age lines on my
face and neck.

I have crow's feet
around my eyes that
make me appear older

AMERICAN IMAGE CORP., Dept. M-4754
275 Park Avenue South, New York, N.Y. 10010

Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula. I understand that if I do not lose my aging sagging appearance after using your "BABY FACE" Formula... I am entitled to a refund of the complete purchase price.

Enclosed is: ☐ Cash ☐ Check ☐ Money Order
☐ 1 order of "BABY FACE" only \$ 9.00
☐ Double Order of "BABY FACE" only \$18.00 (Save \$2.00)
☐ Triple Order of "BABY FACE" only \$27.00 (Save \$3.00)

Name _____

Address _____

City _____

State _____

Zip _____

SORRY... WE DO NOT SHIP C.O.D. ORDERS

I Looked Years Younger ...in Only 2 Short Months!!!



Here I am after using the "BABY FACE" Formula.

Here I am before using the "BABY FACE" Formula.

HERE IS MY GUARANTEE TO MY CUSTOMERS

1. You **MUST** look years younger after using the "BABY FACE" formula.
2. You must have a smoother and softer, younger looking complexion.
3. You **MUST** be satisfied with the results after using the "BABY FACE" FORMULA and see the results you expect in your own mirror or **MONEY BACK**.
4. The "BABY FACE" Formula **MUST** give you the fastest results you have ever witnessed from any beauty preparation.

Yes! This is my unbelievable story of how "I" a 50 year old woman ... transformed herself into a radiant woman who looked years younger! I actually softened and smoothed out my skin tissues so that I now look years younger than I really am. Yes, it was like a miracle took place — as years of lifetime age lines seemed to fade from view in just 60 days.

Even my husband watched this change with disbelief. Facial lines, "crow's feet" and my flabby chin lines and puffy cheeks smoothed almost before my eyes. I did all this by using my own simple formula.

My formula "BABY FACE", certainly was responsible for making me appear years younger and it may do the same for you. The "BABY FACE" Formula goes to work immediately to replenish and revitalize your skin by lubricating and moisturizing, to restore that fresh, youthful appearance. And it's so simple to use that any woman can apply it herself in only a few minutes.

NOW YOU CAN LOOK YEARS YOUNGER

The entire transformation was so easy, quick and pleasant. My formula imparts a new youth-look, beauty and freshness to aging, dry, wrinkled skin — caused by lack of moisture. It works in a completely new and different way from beauty preparations of the past. If you, like many other women, have spent small fortunes on different beauty preparations without the success you expected ... now at last here is your opportunity to try my exciting new formula. It is a "Fountain of Youth" for thirsty dry skin!

LOOK YOUR YOUTHFUL BEST!

BABY FACE has produced startling results in beautifying, and enchanting the skin's appearance. It replenishes lost moisture and helps to obtain a soft, radiant, almost sparkling lustrous complexion, with youthful and exciting tone.

I GUARANTEE RESULTS IN 15 DAYS OR MONEY BACK!

Try the "BABY FACE" Formula at my risk for 15 days FREE. You must capture that radiant young-again look. If during the 15 days trial period you don't see a truly dramatic change and difference in your face ... if you don't feel you look years younger ... return the unused portion for a complete refund. Send for your order now.

SHIPPED IN PLAIN WRAPPER

AMERICAN IMAGE CORP., 276 Park Avenue South, Dept. M-479-P N.Y., N.Y. 10010
Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula.

☐ 1 Order of "BABY FACE" only \$4.98 ☐ Cash ☐ Check ☐ Money Order
☐ Double Order of "BABY FACE" only \$8.00 (Save \$2.00)
☐ Triple Order of "BABY FACE" only \$12.00 (Save \$3.00)

Name _____
Address _____
City _____ State _____ Zip _____

SORRY ... WE DO NOT SHIP C.O.D. ORDERS



JUDICIAL OFFICER
Washington, DC 20260

36a

**EXHIBIT - REMEDIAL MAIL STOP ORDER ANNEXED TO
FOREGOING EXHIBIT E**

ORDER NO. 73-86

DATE: July 19, 1973

TO THE POSTMASTER AT NEW YORK, NEW YORK 10001

Satisfactory evidence has been presented to the Postal Service in the case identified below by docket number that

AMERICAN IMAGE CORP.
276 Park Avenue South
New York, New York 10010

and their agents and representatives (hereinafter the "Respondent") are engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S. Code 3005 (formerly 39 U.S.C. 4005) with respect to

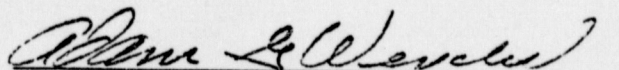
the sale of a product or formula called "Baby Face".

Now, therefore, pursuant to authority vested in the United States Postal Service, and by it delegated to me, I hereby forbid your payment of any Postal Money Order drawn to the order of the Respondent unless you are satisfied that such order does not relate to the above described activities. Further, you are directed to inform the remitter of any Postal Money Order, the payment of which is forbidden by this Order, that the amount thereof will be refunded upon presentation to you of the original order or a duplicate thereof issued by the Postal Service.

You are further directed to hold for not less than 48 hours (exclusive of days during which your office is not open to the public) all mail addressed to the Respondent, whether registered or not, except for any mail, which you determine, by reference to the face of its wrapper, is unrelated to the above described activities. During the 48 hour retention period Respondent shall be permitted to examine the retained mail in your presence or the presence of a postal employee designated by you and to receive any mail which (1) is not connected with the above described activities, or (2) is mail requesting a refund or representing a return of merchandise connected with such activities.

Following such examination by Respondent or the passage of 48 hours, you are directed to write plainly or stamp the words "Return To Sender; Order Issued Against Addressee For Violation of False Representation Law" upon the outside of all mail which the Respondent was not permitted to receive and to return such mail to the post offices from which it was mailed for return to the senders. If the outside of the mail fails to contain information necessary to permit return to the sender, the mail shall be disposed of under the postal regulations applicable to undeliverable matter.

PS Docket No. 1/81 ; G.C. 10-71-F


Judicial Officer

I Looked 20 Years Younger ...in Only 2 Short Months!!!

YES! THIS IS MY UNBELIEVABLE STORY OF HOW "I" A 50 YEAR OLD WOMAN... TRANSFORMED HERSELF INTO A RADIANT WOMAN WHO LOOKED YEARS YOUNGER! I ACTUALLY REJUVENATED MY FACIAL GLANDS AND SKIN TISSUES SO THAT I NOW LOOK YEARS YOUNGER THAN I REALLY AM.

YES, IT WAS LIKE A MIRACLE TOOK PLACE - AS YEARS OF TELLTALE AGE LINES SEEMED TO DISAPPEAR FROM MY FACE IN JUST 60 DAYS. EVEN MY HUSBAND WATCHED THIS CHANGE WITH DISBELIEF. IT WAS ALMOST AS IF I HAD PLASTIC SURGERY, FACIAL LINES, "CROWS FEET" AND MY FLABBY CHIN LINES AND PUFFY CHEEKS SMOOTHED ALMOST BEFORE MY EYES. I DID ALL THIS BY USING MY OWN SIMPLE FORMULA.

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SENSATIONAL BEAUTY PREPARATION HELPS END LINES, WRINKLES AND DRY FLABBY SKIN FOREVER

The entire transformation was so easy quick and pleasant. My formula works in a completely new and different way from beauty preparations of the past. If you, like

HERE IS MY GUARANTEE TO MY CUSTOMERS

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2. Age lines, Wrinkles, Flabby Dry skin MUST disappear.
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4. The "BABY FACE" Formula MUST give you the fastest results you have ever witnessed from any beauty preparation.

PLEASE FILL IN THE FOLLOWING INFORMATION AND MAIL TO YOUR FAVORITE NEWSSTAND

I would like to look younger
My skin on my face and neck is flabby
My skin is too dry and I am
I have wrinkles and age lines on my face and neck
I have crow's feet around my eyes that make me appear older



many other women, have spent small fortunes on different beauty preparations without the success you expected... now at last here is your opportunity to try my exciting new formula.

I GUARANTEE RESULTS IN 15 DAYS OR MONEY BACK!

Try the "BABY FACE" Formula at my risk for 15 days FREE. If during the 15 day trial period you don't see a dramatic change and difference in your face... If you don't feel you look years younger... return the unused portion for a complete refund. Send for your order now... Supplies are limited.

SHIPPED IN PLAIN WRAPPER

AMERICAN IMAGE CORP., Dept. 8454
276 Park Avenue South, New York, N.Y. 10010

Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula. I understand that if I do not lose my aging sagging appearance after using your "BABY FACE" Formula... I am entitled to a refund of the complete purchase price.

Enclosed is: ☐ Cash ☐ Check ☐ Money Order

☐ 1 order of "BABY FACE" only \$4.98
☐ Double Order of "BABY FACE" only \$8.00 (Save \$2.00)
☐ Triple Order of "BABY FACE" only \$12.00 (Save \$3.00)

Name _____

Address _____

City _____

State _____

Zip _____

SORRY... WE DO NOT SHIP C.O.D. ORDERS

OLD
ADVERTISEMENT

I Looked Years Younger ...in Only 2 Short Months!!!



Here I am after using the "BABY FACE" Formula.



Here I am before using the "BABY FACE" Formula.

HERE IS MY GUARANTEE TO MY CUSTOMERS

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SHIPPED IN PLAIN WRAPPER

AMERICAN IMAGE CORP., 276 Park Avenue South, Dept. 8454, N.Y. N.Y. 10010
Enclosed is my payment in FULL for your wonderful "BABY FACE" Formula.

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☐ Triple Order of "BABY FACE" only \$12.00 (Save \$3.00)

Name _____

Address _____

City _____

State _____

Zip _____

SORRY... WE DO NOT SHIP C.O.D. ORDERS

NEW
ADVERTISEMENT

Exhibit "F"

EXHIBIT G - LETTER DATED MAY 31, 1972 FROM BASS AND ULLMAN
TO UNITED STATES POSTAL SERVICE

May 31, 1972

United States Postal Service
Office of the General Counsel
U. S. Postal Service Building
12th and Pennsylvania Ave. NW
Washington, D. C. 20260

Attention: Richard Hefner, Esq.

Re: American Image Corp. GC # 10-71-F

Dear Mr. Hefner:

Pursuant to our discussions with respect to the above matter, I am enclosing herewith an original and 3 copies of a Compromise Agreement with a rider attached thereto, executed by the respondent.

As per our telephone conversation this date, it is understood that the Compromise Agreement and rider shall apply not only to the advertising matter annexed as Exhibit "A" to the Complaint but also to the advertisement for Baby Face Formula in the company's present catalog; no further catalogs will be printed containing the representations for Baby Face Formula alleged in the Complaint and the use of the existing catalog will be discontinued no later than June 30, 1972. Any orders received by the company for Baby Face Formula as a result of the existing catalog will be accompanied with a statement as required by the rider to the Compromise Agreement.

It is also our understanding that the allegations of Paragraph (3)c. of the Complaint are intended to be construed in terms of the allegations in Paragraphs (3)a. and (3)b. of the Complaint.

Thank you for your attention herein.

Very truly yours,
BASS & ULLMAN

Robert Ullman

RU:pak
Encl.

OPINION AND ORDER OF THE COURT BELOW

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KNAPP, J.

This is an action by plaintiff to enjoin the Postal Service from enforcing Order No. 73-86 issued pursuant to 39 U.S.C. §3005. The effect of the Order is to intercept mail and payments sent to plaintiff in connection with a scheme perpetrated by plaintiff to obtain money by means of representations deemed by the Postal Service to be false. Jurisdiction rests on 39 U.S.C. §409. Both parties move for summary judgment.

The following facts are undisputed:

In April, 1972, the Postal Service initiated administrative proceedings against plaintiff by filing a complaint under 39 U.S.C. §3005 based on plaintiff's advertisements for its cosmetic product called "'Baby Face' Formula." Plaintiff filed an Answer to the complaint.

On May 31, 1972, plaintiff and the Postal Service signed a Compromise Agreement. The Agreement provided inter alia that the Postal Service would suspend further proceedings against plaintiff, and in return plaintiff consented (1) to discontinue use of the offending advertisement, and (2) to a procedure whereby "A breach of this agreement . . . will warrant the issuance of an order pursuant to [39 U.S.C. § 3005], . . . provided that the undersigned . . . is first served with a copy of the petition for such order."

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In June, 1973, the Postal Service filed such a petition, claiming that the Compromise Agreement had been breached by use of a subsequent advertisement for "'Baby Face' Formula." Plaintiff answered the petition. On July 19, 1973, a Judicial Officer for the Postal Service issued a finding that plaintiff had breached the Agreement and the \$3005 Order here sought to be enjoined.

The questions presented are:

- (1) Whether plaintiff should have been afforded a full administrative hearing prior to issuance of the adverse finding and Order;
- (2) if the first question is decided in the negative, what evidentiary standard should be applied to review the administrative action here challenged, and
- (3) applying the proper standard, whether the administrative action should be upheld or overturned.

As to the first question, the Court has no doubt that by signing the Compromise Agreement plaintiff waived its right to hearing on the issue of (1) whether its original advertisement contained the alleged false representations, and (2) whether a subsequent advertisement constituted a breach of the compromise Agreement. Plaintiff's argument to the contrary

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is completely unpersuasive in that any interpretation of the Compromise Agreement other than the one above stated renders meaningless the consideration given by plaintiff in return for the suspension of proceedings by the Postal Service. See Judge Palmieri's well-reasoned discussion in U.S. Bio-genics Corp. v. Christenberry (SDNY 1959) 173 F Supp. 645.

As to the second question, the Court is of the view - and counsel agree - that a de novo review of the administrative finding is permissible under these circumstances - viz., where no hearing was held nor testimony taken. To determine whether plaintiff breached the Agreement all that is required is an examination of the exhibits, and the Court is in as good a position as the Judicial Officer to so examine them. Compare Mark Eden v. Lee (9th Cir. 1970) 433 F 2d 1077, and Baslee Products Corp. v. United States Postal Service (D.N.J. 1973, Judge Lacey) 356 F Supp 841 [hearings held; thus "substantial evidence" standard applied).

Turning then to the final question, upon careful comparison of plaintiff's discontinued and "new" advertisements the Court is persuaded of the correctness of the administrative finding.

The discontinued advertisement was originally complained of because it contained in substance the following false representations either expressly or impliedly:

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(a) that if women used "'Baby Face' Formula" they would soon look years younger, (b) that if women used "'Baby Face' Formula," wrinkles, lines and flabbiness would disappear, and (c) that "'Baby Face' Formula" contains unique properties. Postal Service Complaint, paragraph 3, plaintiff's exhibit A annexed to Notice of Motion.

The originally offending ad annexed to the Postal Service Complaint and attached hereto is of the fervent testimonial variety. A bold headline proclaims "I LOOKED 20 YEARS YOUNGER . . . IN ONLY 2 SHORT MONTHS!!!" In the top right-hand corner are two "before and after" photographs of the ecstatic convert; however at least from the xeroxed copy of the ad submitted to the Court it is impossible to discern the basis for her ecstasy. The remainder of the advertisement consists largely of hosannas to the miraculous qualities and effects of "Baby Face' Formula."

The "new" advertisement annexed hereto bears the identical headline save that it omits the adjective "20" that modified "years " in the original. The three false representations originally complained of appear in the new ad, albeit in a slightly less adamant fashion. Thus, as to the rejuvenating effect of the formula, the pictured convert still proclaims that her husband watched the change in her appearance with "disbelief,"

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and that "I actually softened and smoothed out my skin tissues so that I now look years younger than I really am." The implication is plain that users will enjoy the same result.

As to wrinkles, lines and so on, the pictured woman in the new ad states that "years of telltale age lines seemed to fade from view in just 60 days" and that "facial lines, 'crows feet' and my flabby chin lines and puffy cheeks smoothed almost before my eyes."

Finally, the unique properties of the formula are extolled in language identical to that originally complained of, viz.: "It works in a completely new and different way from beauty preparations of the past."

Plaintiff seizes upon minor modifications concededly made in its new ad to support its contention that use of the new ad does not constitute a breach of its promise contained in the Compromise Agreement to discontinue use of the original advertisement. However, the Court fully agrees with the Judicial Officer's finding that the thrust of the new ad with respect to the three false representations is the same as that of the old. The cases are clear that such advertisements are to be viewed not with a lawyer's eye to "fine spun distinctions" but with an eye to their over-all effect upon the average reader. Donaldson v. Read (1948) 333 U.S. 178 and cases cited. Applying that standard it is plain that the new ad continues to represent falsely the properties and

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effects of "'Baby Face'Formula." Its use thus does constitute a breach of the Compromise Agreement. Plaintiff perhaps should never have signed such agreement had it wished the opportunity to establish the validity of the claims made on behalf of its product. That opportunity is, however, now foreclosed.

Summary judgment granted to defendant and the complaint dismissed.

IT IS SO ORDERED.

Dated: New York, New York
January 14, 1974.

WHITMAN KNAPP, U.S.D.J.

COURT OF APPEALS:SECOND CIRCUIT

~~X~~AMERICAN IMAGE CORP.,
Plaintiff-Appellant,
against
U. S. POSTAL SERVICE, et al,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York
That on the 14th day of June 1974 at Foley Square, New York

deponent served the annexed *Appellants' Appendix* upon
Paul J. Curran-U.S. Attorney - Southern District-Attorney for Appellees

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 14th
day of June 1974

James Steele
Print name beneath signature

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

Robert T. Brin

